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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner American Telephone and Telegraph Company requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported, appears at Appendix A to this

petition,[1] The decision of the Federal Communications Commission, which is reported at 60 F.C.C.2d 25, appears as Appendix B.[2]

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment in this case, was entered on July 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Ordinary long distance telephone service in the United States has been provided on a regulated, noncompetitive basis for over a half century. By statute, new competitors require prior FCC authority before they begin to operate, and the FCC may authorize a new carrier to provide only a particular type or "class" of service. Construing its own prior decisions and grants to "specialized carriers" the FCC held in this case that such carriers have been authorized to provide a class of service known as "private line" but have not been authorized to provide ordinary long distance telephone service. The question presented is:

Whether the Court of Appeals for the District of Columbia Circuit erred when, in direct conflict with decisions of the Ninth and Third Circuits, it determined that a leading specialized carrier is authorized

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[1] The appendices are separately bound in a companion volume cited as "Pet. App."

[2] A prior letter-order of the FCC, reaffirmed by its principal decision, is reprinted in the principal decision and appears at Pet. App. 70b.

to provide ordinary long distance telephone service, despite repeated pronouncements by the FCC that it has authorized specialized carriers to provide only private line service and has never authorized such carriers to provide ordinary long distance service and never found that such competition for that class of service would serve the public interest.

STATUTES INVOLVED

Pertinent provisions of the Communications Act appear as Appendix C.

STATEMENT OF THE CASE

A. The Regulatory Framework and Background

For over half a century, AT&T has managed and operated the interstate switched telephone network to provide "switched public message services" [3] throughout the United States in cooperation with local telephone companies.[4] The most familiar service is "MTS", or ordinary long distance service,[5] which

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[3] The FCC's rules define a "public message service" as one offered on "a non-exclusive message by message basis, contemplating a separate connection for each occasion of use." 47 C.F.R. § 21.2 (1976).

[4] AT&T and the local telephone companies, which include 23 Bell System operating companies and about 1,600 independent telephone companies, operate as partners and do not compete with each other; in general, AT&T carries the call over its interstate network between local exchanges, and the local operating company at the origin and destination cities is responsible for local distribution of the call through its local facilities.

[5] MTS means Message Telecommunications Service. WATS, or Wide Area Telephone Service, is another familiar switched public message service.

allows any person to use any telephone connected to the network in one city to call long distance to any other connected telephone in the destination city. The call travels over a complex network of intercity circuits and is routed by switching equipment along the most efficient path available. The caller must establish a new connection for each call and pays for MTS on a per call basis. See generally *Doniphon Telephone Co.* v. *AT&T*, 34 F.C.C. 950, 962 (1962), *aff'd*, 34 F.C.C. 949 (1963).

The unified switched public network has achieved extraordinary benefits for the public. By concentrating all of the MTS traffic on this integrated system, AT&T is able to utilize high capacity transmission systems and drastically reduce unit costs;[6] in fact, a long distance call costs less today than it did prior to World War II despite rising prices in almost every other field. Provision of MTS under regulation, on a noncompetitive basis, has also permitted nationwide MTS rates to be based on *average* costs so that along less heavily used routes, where the cost of providing service is relatively high, telephone service can be made available at affordable rates.[7]

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[6] For example, the investment for a small capacity cable system providing 1,800 two way voice circuits is about $17.22 per circuit mile, while the investment for a giant cable system providing 132,000 circuits is about $1.68 per circuit mile. Realizing such unit cost savings requires that sufficient traffic be concentrated on the main routes of the unified network to justify the necessary investment in high capacity systems.

[7] Without such rate averaging—which has been sanctioned by both the FCC and state regulatory agencies—long distance calls between many points, especially small cities and rural areas, would be much higher. In addition, the revenues generated by MTS contribute through the "separations" process to holding down local

In addition to services like MTS, AT&T and the local telephone companies have long provided various types of "private line" service.[8] A private line provides the user, for a fixed monthly charge, with an exclusive circuit or circuits available for communication by him between two or more fixed locations. For example, a "tie line" that connects a manufacturer's warehouse in Baltimore with its bookkeeping center in New York is a private line. Since the private line circuits are normally dedicated to the use of a particular customer, they can be tailored to meet his specialized needs such as the points to be connected, circuit capacity provided, and type of circuit.

Although MTS has always been provided on a regulated, non-competitive basis, the FCC has recently taken a different approach to private line service. In 1969, it allowed the respondent MCI to construct on an experimental basis a single system between Chicago and St. Louis to provide private line service. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970). In 1970, the FCC found itself faced with a large number of applications from so-called "specialized carrier" applicants—including MCI—seeking to provide private line service in competition with AT&T.

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telephone rates, particularly basic residential rates, throughout the country; this is accomplished by the use of interstate revenues to defray local costs under procedures approved by the FCC and state regulatory agencies. See *AT&T*, 9 F.C.C.2d 30, 88-94 (1967).

[8] A "private line service" is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2 (1976).

Under the Communications Act and this Court's decision in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), the new carriers could not provide such service or even initiate construction of the necessary facilities without first obtaining FCC authorization based on public interest findings of need and public benefit.[9] MCI, like other applicants, represented to the FCC that "MCI-type applicants propose to offer only customized point-to-point services and have no intention of attempting to compete with [AT&T] in providing local exchange or *long distance toll telephone service,* which account for the bulk of [AT&T] revenues." MCI comments, FCC Docket No. 18920, October 1, 1970, pp. 27-28 (emphasis added).

B. The Specialized Carrier Decision

Instead of holding hundreds of route by route hearings, the FCC determined to resolve the basic public interest questions posed by the applications and establish the framework for future specialized carrier operations in a single rulemaking proceeding. In its 1971 *Specialized Carrier* decision, the FCC created a new class of limited-service "specialized carriers" to provide private line service.[10] In the decision, the FCC

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[9] Section 214 of the Communications Act, 47 U.S.C. § 214, requires certificates of public convenience and necessity for new interstate "lines"—defined as "any channel of communication"—whether established by cable or radio. In addition, Sections 307-09 of the Act, 47 U.S.C. §§ 307-09, require station licenses based on public interest findings wherever radio frequencies are to be used. Specialized carriers use microwave radio to create lines and therefore need both certificates and licenses, and the FCC ordinarily makes a single public interest determination in such cases.

[10] *Specialized Common Carrier Services,* 29 F.C.C.2d 870, *recon. denied,* 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975). The specialized carriers which have resulted

repeatedly said that it was authorizing specialized carriers to provide "private line" service; and its affirmative public interest findings, including the crucial finding of benefit required under *FCC* v. *RCA Communications, Inc.*, related specifically to "private line services proposed by [MCI] and other applicants."[11]

Conversely, in considering the possible adverse impact of the new competition, the FCC made clear that it was not authorizing specialized carriers to provide switched public message service such as MTS and therefore saw no threat of increased MTS rates for the public. Thus, it found the bulk of the Bell System's revenues came from services (MTS and WATS) "which the applicants do not seek to provide," whereas interstate private line revenues amounted to only about 4 percent of total Bell System revenues. 29 F.C.C.2d at 911. In addition, the Commission concluded that nationwide rate averaging used by the existing carriers for MTS and WATS would not be jeopardized (see p. 30, below), since the specialized carriers had not sought to provide such services. *Id.* at 915.

On review in the Ninth Circuit, the FCC and the Department of Justice represented that "the Commission's decision . . . to allow competition . . . involves essentially private line offerings as distinguished from local telephone exchange and long distance toll tele-

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from that decision are merely one of a number of classes of limited-service carriers which the FCC has created from time to time to provide particular types of common carrier service. See p. 23, below.

[11] 29 F.C.C.2d at 882, quoting staff analysis. Numerous other references to private line service in the *Specialized Carrier* decision are reprinted in a compilation contained in Appendix D to this petition. Pet. App. 8d-10d.

phone services." [12] In affirming the *Specialized Carrier* decision, the Ninth Circuit expressly adopted this interpretation. 513 F.2d at 1155-56. The same interpretation was adopted by the Third Circuit, after similar representations by the Government (Pet. App. 13d-15d), in reviewing a related, subsequent order of the FCC. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1254-55, 1273-74 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).[13]

Following the *Specialized Carrier* decision, the FCC has issued thousands of grants and licenses to specialized carriers in reliance on its main decision and without any further public interest findings. The applications and grants, excerpts of which are included in Appendix F to this petition, repeatedly either refer to private line service or incorporate by reference the *Specialized Carrier* decision itself. The central premise that the *Specialized Carrier* decision was confined to authorizing only private line competition has been repeated in subsequent FCC decisions,[14] in briefs submitted by the FCC and the Department of Justice in

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[12] Brief for the FCC and the United States, pp. 4-5, in *Washington Utils. & Transp. Comm'n* v. *FCC*, *supra*. MCI expressly adopted the Government's statement of facts in its own brief (p. 1).

[13] In addition, both the Government and MCI represented to this Court, in opposing certiorari, that the *Specialized Carrier* case was concerned with "private line" service. See opposition of the Government, Sup. Ct. No. 74-1550, pp. 2-3 (Ninth Circuit); opposition of MCI, Sup. Ct. No. 74-1229, p. 3 (Third Circuit).

[14] *E.g.*, *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 853, *recon. denied*, 38 F.C.C.2d 665 (1972); *Resale and Shared Use of Common Services*, 60 F.C.C.2d 261, 293 (1976), *recon. denied*, 62 F.C.C.2d 588, 602-03 (1977), *appeal pending sub nom. AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.*

at least three circuits [15] and to this Court (see p. 8, n. 13, above), and in statements by the FCC to Congress.[16]

C. Proceedings Below

Although MCI began to provide private line service in 1972, neither then nor later did MCI seek authority to provide MTS. Instead, beginning in late 1974, MCI sought to introduce a form of MTS under the pseudonym "Execunet." What MCI did was to connect its intercity lines to local telephone company exchanges at both ends,[17] configure the circuits so that any customer could utilize any telephone or intercity circuit

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[15] *E.g.*, "The *Specialized Common Carrier Services* proceeding involved rulemaking for the determination of basic, broad policies with respect to provision of the full range of private line services . . . ." Brief of the FCC and the United States, pp. 41-42, in *Bell Telephone Company of Pennsylvania* v. *FCC*, *supra*. Extracts from briefs of the Government in the Third, Ninth and District of Columbia Circuits appear at Pet. App. 10d, 12d-13d, 14d-15d.

[16] *E.g.*, "One thing you must understand—the competition we have introduced has been in the private line and not the message toll service . . . ." *Hearings Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess., March 11, 1975, p. 46 (Statement of Chairman Wiley). Various congressional statements reflect the same understanding. *E.g.*, "It should be emphasized that the private line and terminal equipment sectors of the industry are the only two areas that the FCC has opened to competition. The public telephone network has remained a regulated monopoly . . . ." *Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, March 21, 1977, p. 14 (Statement of Senator Hart).

[17] The specialized carriers use local facilities of the telephone companies to connect the end points of their intercity circuits with the customer's premises. However, use of the local facilities has been mandated only for the specialized carriers' authorized private line services. See *Bell Telephone Company of Pennsylvania* v. *FCC*, *supra*, 503 F.2d at 1273-74.

in turn, and thereby offer customers essentially the same service as they currently receive from MTS.[18]

As with MTS, an Execunet customer has access from any telephone in one city to any telephone in a distant city on a call-by-call basis. Pet. App. 31b-32b, 64b-70b. Subject to a monthly minimum charge, an Execunet customer, like the MTS customer, is charged for each call at a rate dependent on the distance called and the length of the call. *Id.* Neither Execunet nor MTS provides a customer with the exclusive use of an intercity circuit; the Execunet customer, like his MTS counterpart, uses whatever MCI intercity circuits are available, as well as local telephone switching facilities and circuits. *Id.*

After a lengthy investigation, the FCC released its decision in this case on July 13, 1976, unanimously affirming that Execunet was an unlawful service. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (Pet. App. 1b).[19] In its detailed decision, the FCC construed its own *Specialized Carrier* decision and confirmed that specialized carriers such as MCI have been authorized to provide only private line service.[20] The FCC further

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[18] Charts comparing Execunet and MTS, introduced by AT&T in the FCC proceeding, appear at Appendix E to this petition. The chart of Execunet depicts its operation consistent with the FCC's own findings. See Pet. App. 2b-3b & n.1.

[19] Previously, the FCC had determined in a letter-order of July 2, 1975, that Execunet was beyond MCI's authority. Pet. App. 70b-76b. On review in the lower court, MCI raised new arguments; accordingly, the lower court held the case in abeyance so that MCI could make its full presentation to the FCC. The jurisdiction of the Court of Appeals rests on 28 U.S.C. § 2342.

[20] The FCC cited the language and reasoning of its own *Specialized Carrier* decision, which "makes it quite clear that we intended

found on the undisputed facts that Execunet had "all the essential characteristics" of switched public message service and none of the characteristics of private line service. Pet. App. 35b.

On July 28, 1977, the lower court reversed. It held that MCI was free to provide any service, including MTS, over the communication facilities which the FCC had previously authorized and held to be limited to private line service. Pet. App. 1a. The court did not deny that Execunet was a form of switched public message service (Pet. App. 26a), and it acknowledged that the FCC had never specifically authorized competition in the switched public message service field or found that such competition would serve the public interest. Pet. App. 29a, 31a. Nevertheless, the court asserted that the FCC could not grant authorization limited to proposed services without addressing the services the applicants do *not* propose to provide and affirmatively finding that it would be contrary to the public interest for them to provide such additional, never-proposed services. Pet. App. 29a-30a.

ARGUMENT

Certiorari is warranted and urgently required on several independent grounds. The lower court decision is in direct conflict with decisions of the Ninth Circuit and the Third Circuit. The latter two circuits clearly construed the *Specialized Carrier* decision as properly confined to authorizing private line service. That construction is supported by the language and reasoning

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and did open competition only in . . . private line services" (Pet. App. 20b), and the FCC relied directly on the decisions of the Ninth and Third Circuits. Pet. App. 22b-23b.

of the agency and by its consistent, subsequent administrative interpretation. See generally *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969).

In addition, the lower court's decision involves clear statutory error. The Communications Act permits applications to be granted "as applied for" (Section 214(c)) and allows the FCC to "classify" stations and services (Section 303(a), (b)). MCI-type carriers only applied for authority to provide private line service and have never been authorized to provide switched public message service. Contrary to *FCC* v. *RCA Communications, Inc.*, the lower court's reading of the statute would authorize competition for switched public message service, even though the FCC has never found that it would serve the public interest.

Finally, among numerous other adverse consequences, the lower court's decision undermines decades of settled practice by which limited service carriers have been created by the FCC and by similar agencies, and it threatens the validity of dozens of classifications and thousands of grants. Because of the lower court's statutory holding, this situation—which will cause serious administrative and judicial disruption—can be rectified only on certiorari and not by further agency proceedings.

I. The Decision Below Directly Conflicts With the Decisions of the Ninth and Third Circuits on the Lawful Scope of Specialized Carrier Service.

The holding of the District of Columbia Circuit, that specialized carriers are free to offer switched public message service, conflicts with the decisions of the Ninth Circuit in *Washington Utils. & Transp. Comm'n*

v. *FCC* and the Third Circuit in *Bell Telephone Company of Pennsylvania* v. *FCC*. In each case, the Government represented that the FCC had only authorized competition for private line service (see Pet. App. 10d, 14d-15d); and in each, this representation was an essential premise of the court's decision. Unquestionably, this is a case where a "court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter," so as to warrant review by this Court. Sup. Ct. Rule 19(1)(b).

The Ninth Circuit, in affirming the *Specialized Carrier* decision, expressly found:

> "The business involved is that of providing specialized *private or leased line* communication services through microwave transmission facilities *as distinguished from* public exchange and *long distance toll telephone service.*" 513 F.2d at 1155 (emphasis added).

Summarizing the FCC's own determinations, the Ninth Circuit stated that new entry in the specialized field would not adversely affect existing carriers because the specialized services in question represented only a "very small percentage of A.T.&T.'s total market" and "[t]he market for *standard voice communications services* is not affected."[21] The premise that specialized carriers were limited to private line service was essential to the Ninth Circuit's decision in two different respects.

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[21] *Id.* at 1156 n.21 (emphasis added). The court also stated that "[t]he record as a whole indicates that entry by more than one *private line carrier* should generally be reasonably feasible . . . ." *Id.* at 1167 n.33 (emphasis added).

First, the Ninth Circuit had to determine whether the introduction of new competition rested on a showing of public interest need, as required by the Act and by this Court in *FCC* v. *RCA Communications, Inc.*[22] The Ninth Circuit found that the FCC had made such a showing with respect to private line service.[23] The Ninth Circuit did not and could not make any such finding with respect to switched public message service. Thus, had the FCC authorized such competition in the *Specialized Carrier* decision, the Ninth Circuit would have been compelled to reverse based on its own reasoning and the principles of *RCA*.

Second, the Ninth Circuit took note of the FCC's ultimate finding that "there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers" so as to outweigh the benefits of new entry. 513 F.2d at 1155-56. However, as the Ninth Circuit recognized, this determination itself rested on subsidiary FCC findings confirming that specialized carrier competition would

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[22] The *RCA* decision, which the Ninth Circuit canvassed at length (513 F.2d at 1158-59), determined that Congress had not intended the FCC to permit new common carrier entry merely on the assumption that "competition is bound to be of advantage . . . ." 346 U.S. at 97. Rather, this Court found that "the Commission must at least warrant . . . that competition would serve some beneficial purpose" and that there be "ground for reasonable expectation" that this benefit would be achieved. *Id.* at 97.

[23] The Ninth Circuit quoted the FCC's ultimate finding that "a public need and demand [existed] for the proposed facilities and services" (513 F.2d at 1155) and summarized the supporting subsidiary findings, including the FCC's view that existing carriers alone might not meet the needs of the specialized market "and still meet the increasing requirements of the public monopoly services [MTS and WATS] . . . ." *Id.* at 1156 n.21.

not include MTS.[24] If these findings had not been accepted, the Ninth Circuit clearly could not have affirmed. *Id.* at 1159-60.[25]

The lower court decision also conflicts with the decision of the Third Circuit in *Bell Telephone Company of Pennsylvania* v. *FCC*. There, the Third Circuit had before it an order requiring local telephone companies to provide local distribution facilities to specialized carriers (see p. 9, n. 17, above) for two types of service denominated FX and CCSA (described at 503 F.2d at 1254 n.4). The scope of the *Specialized Carrier* decision was directly in issue because the telephone companies claimed that it did not authorize specialized carriers to provide FX or CCSA service. The telephone companies also argued that the FCC's interconnection order before the court was too broad and ambiguous to be sustained.

The Third Circuit concluded that the *Specialized Carrier* decision was co-extensive with private line service and therefore included FX and CCSA because

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[24] In summarizing the supporting findings, the Ninth Circuit mentioned *inter alia* the small percentage of the market involved (*id.* at 1156 n.21), an obvious reference to the FCC's determination that private line services being opened to competition represented only 4 percent of Bell System revenues. 29 F.C.C.2d at 911. In noting that "[t]he market for standard voice communications service is not affected" and this "accounts for the bulk of A.T.&T.'s revenue" (513 F.2d at 1156 n.21), the Ninth Circuit necessarily referred to the FCC's finding that MTS and WATS represented 87 percent of Bell System interstate revenues (29 F.C.C.2d at 911) and were services the FCC did not authorize the specialized carriers to provide. *Id.* at 915.

[25] See generally *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940); *Carroll Broadcasting Co.* v. *FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

the FCC deemed them to be private line services. In parsing the *Specialized Carrier* decision, the Third Circuit found that specialized carriers were permitted to provide services "within the rubric of 'private line services'" (503 F.2d at 1260-61), and that the FCC's evaluation demonstrated that "the public interest favored the entry of specialized carriers into the full field of private line services." *Id.* at 1270. If the Third Circuit had regarded the *Specialized Carrier* decision as authorizing competition for *any* service including MTS, then its entire course of reasoning would have been superfluous and mistaken.[26]

Moreover, the Third Circuit made clear that it was rejecting the overbreadth and vagueness attacks on the interconnection order *because* of the limited class of competitive services involved. The Third Circuit's decision said that it "would be inclined to agree with [the telephone companies] that the order is somewhat vague and, to a certain extent, overbroad" if the order were read in the abstract. 503 F.2d at 1273. However, it found that the order took on adequate specificity as a result of its context, which related the order to the FCC's determination to permit "competition in the provision of the interstate private line communications . . . ." *Id.* (quoting the FCC's own description of the *Specialized Carrier* case).

In light of the language and reasoning of the Ninth and Third Circuit decisions, the lower court in this case

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[26] Not only would it have been unnecessary for the Third Circuit to ascertain that the *Specialized Carrier* decision included the "full field" of private line services (see *id.* at 1270), but it would have been pointless for the Third Circuit to consider carefully, as it did, whether FX and CCSA fell within the private line "rubric." See *id.* at 1261.

clearly erred when it sought to distinguish those decisions on the ground that the "issues" in those cases differed. Pet. App. 25a-26a n.59. The Ninth and Third Circuits did consider and had to conclude, as their own language and reasoning showed, that the specialized carriers had been authorized to provide private line service but that competition beyond this boundary had not been contemplated or authorized. Accordingly, there is a direct conflict among the circuits.[27]

The conflict in the circuits is not limited to an abstract or hypothetical disagreement. If the lower court's view of the *Specialized Carrier* decision were correct, that decision—which is the basis for all of MCI's subsequent grants—would not have been sustained by the Ninth Ciruit, and today MCI could offer no service whatever, let alone Execunet. See p. 14, above.[28] In short, the conflict has produced a result re-

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[27] In fact, prior to the present case, the District of Columbia Circuit had itself rendered decisions that are inconsistent with the decision below. In *Nader* v. *FCC*, 520 F.2d 182, 187 (D.C. Cir. 1975), the court stated that "MTS and WATS are essentially monopoly services . . . . AT&T's [other] interstate revenue accrues from private line service . . . . Unlike MTS and WATS, several specialized carriers, including MCI, compete with AT&T in this part of the market."

In an even more recent decision, the court construed the *Specialized Carrier* decision thusly: "In announcing a general policy in favor of competitive entry the Commission decided broadly [in the *Specialized Carrier* case] that the public interest, convenience, and necessity would be served by permitting specialized common carriers to provide a full range of *private line* communications services . . . ." *AT&T* v. *FCC*, 539 F.2d 767, 773-74 (D.C. Cir. 1976) (emphasis added).

[28] The FCC's findings and the Ninth Circuit's affirmance clearly do not provide a public interest basis for authorizing competition

specting Execunet itself that is logically impossible and creates a special warrant for Supreme Court review to resolve the conflict. *Commissioner* v. *Gordon*, 391 U.S. 83 (1968) (conflict on tax consequences of same transaction).

Finally, the conflict involves a serious element of misdirection. If the District of Columbia Circuit decision stands, then the Ninth and Third Circuit each acted on the basis of crucial misstatements by the Government and MCI concerning the scope of the *Specialized Carrier* decision. See Pet. App. 1d-16d. Indeed, the representations were repeated not only in the circuit courts but to this Court as well when the Government and MCI successfully opposed certiorari from the Ninth and Third Circuit decisions. See p. 8, above. Accordingly, judicial review of this conflict is required in order to vindicate the courts' own processes.

II. The Lower Court Has Fundamentally Misconstrued the Governing Statute In Disregard of Its Language, Purpose and History.

In holding that MCI could provide any service it chose, the lower court construed the Communications Act as precluding the FCC from granting a carrier only limited authority—even though the carrier had applied only for limited authority—"unless [the FCC] has affirmatively determined that 'the public conve-

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for switched public message services such as MTS, a necessary predicate under the Act and *RCA* for validly authorizing unlimited service. See p. 14, above. Accordingly if MCI's certificates are read as unlimited, then they are themselves invalid.

nience and necessity [so] require' " such a limitation. Pet. App. 24a. Since it discerned no such "affirmative determination" in the *Specialized Carrier* decision (*id.* at 29a-30a), the lower court concluded that MCI was free to provide switched public message service including MTS. The lower court's reading of the statute is at odds with the language of the Act, with its purpose, with rationality, and with the FCC's continuing administrative construction of the Act for almost half a century.

The Communications Act clearly forbids a carrier to construct or operate any channel of communication (Section 214) or transmit any radio signal (Sections 301, 307-09) until the FCC has determined that the public interest so warrants. In determining whether the public interest would be served, the FCC necessarily must first determine what service or class of services the carrier proposes to provide, so that it can evaluate the public interest need and any adverse effects that may result. Not surprisingly, Section 63.01 of the FCC's rules, which specifies the "contents of applications" under Section 214 of the Act, provides that the application shall include a statement of "the nature and classification of the communication services to be provided (e.g., . . . *private line* . . . etc.)." [29]

In the *Specialized Carrier* case, the FCC was confronted with applications from MCI-type carriers

[29] 47 C.F.R. § 63.01 (1976) (emphasis added). Similarly, Section 21.706 of the FCC's rules which includes requirements for applications to establish radio stations in the frequencies utilized by MCI, requires the applicant to specify "[t]he nature and type of services to be rendered (e.g., . . . *private line* . . . etc.)." 47 C.F.R § 21.706 (1976) (emphasis added).

solely to provide private line service.[30] The FCC's language and its findings, both as to need and adverse effect, contemplated that only private line service was being authorized. See p. 7, above. The FCC has repeatedly and uniformly construed its decision in this way.[31] Accordingly, the only remaining question is whether such a limited grant of authority could lawfully be made in the absence of the "affirmative determination" which the lower court deemed necessary under the statute.

Section 214(c) of the Act expressly states that the Commission "shall have power to issue such certificate as applied for"; and Section 303(b) of the Act, also expressly relied on in the *Specialized Carrier* decision (29 F.C.C.2d at 941), allows the FCC to prescribe "the nature of the service to be rendered by each class of licensed stations and each station within any class." Since the MCI-type carriers had only sought authority to provide private line service, the FCC was entitled under the plain language of the Act to establish such

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[30] MCI itself stressed that it was not seeking authority to provide "long distance toll telephone service" (see p. 6, above), and it also said that "the switched voice services" were the field "which we do not seek to enter." MCI reply comments, FCC Docket No. 18920, Dec. 2, 1970, p. 27. Similarly, the Government advised this Court that the FCC was faced with "40 applications . . . collectively seeking more than 1,700 licenses" in order "to provide a variety of interstate private line services." Opposition of the Government, Sup. Ct. No. 74-1550, pp. 2-3.

[31] In view of the repeated references to private line service in the decision and its uniform interpretation in subsequent FCC decisions (see Pet. App. 8d-9d, 11d-12d), the FCC's construction of the intent of the decision is controlling. *E.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

a "class" and grant MCI authority "as applied for." [32] Nothing in the statute compelled the Commission to make any qualifying "affirmative determination" when it granted limited authority to the specialized carriers to do only what they themselves had proposed.[33]

The purpose of the Act also supports the FCC's understanding. In requiring prior approval, Congress recognized "that competition between carriers may result in harm to the public as well as in benefit" and "that when a [carrier] inflicts injury upon its rival, it may be the public which ultimately bears the loss." [34] Yet, on the lower court's reading, the FCC authorized duplicative new facilities to provide com-

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[32] In affirming the *Specialized Carrier* decision, the Ninth Circuit observed that "the Commission may determine general questions relating to the public interest, convenience, and necessity in rulemaking proceedings; and, specifically, may determine that competition in the furnishing of *a class of regulated service* will lead not to poorer but to better service to the public, and will otherwise be in the public interest." 513 F.2d at 1166 (emphasis added).

[33] The lower court's two statutory references to support its "affirmative determination" requirement are more puzzling than persuasive. It said that the FCC must "strictly follow the terms of Section 214(c)" (Pet. App. 24a), but that provision itself says the FCC may grant the certificate "as applied for" and does not refer to "affirmative determinations." The court also relied on "the final proviso" of Section 214(a) (*id.* at 23a), but that merely permits carriers to make minor alterations in the course of providing existing service and has nothing to do with attempts to provide new services beyond the scope of the carrier's basic authority.

[34] These grounds are attributed by this Court to Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), which was the direct predecessor of Section 214 of the Communications Act. *Texas & P. Ry.* v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266, 277 (1926) (Brandeis, J.). See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) (analogizing the regulation of rail and telecommunications common carriers).

petition for MTS even though on the lower court's own view the FCC has never determined whether such "competition between carriers" would result in harm or benefit or whether it would inflict "injury" resulting in public "loss." Compare *FCC* v. *RCA Communications, Inc., supra,* 346 U.S. at 96-97.[35]

The lower court's construction also fails the test of rationality. It would be time-consuming and pointless for an agency, asked to authorize new facilities or radio transmission for a limited use or service, to make affirmative determinations about other uses or services neither requested by the applicant nor intended to be authorized by the agency. If and when a limited service carrier wishes to expand operations beyond the scope of its basic authority, it can always return to the agency and apply for a broader certificate upon a showing that such a grant would serve the public interest.[36] Delay and needless litigation would result if the agency were forced, before granting a limited service certificate, to make findings about myriad other possible activities which the carrier has not sought to provide and which the agency does not propose to au-

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[35] The lower court's reading is especially incongruous because the *Specialized Carrier* decision, in its references to switched public message service, recognized the serious public interest problems that would be presented by MTS competition and made clear that no such competition was being authorized. 29 F.C.C.2d at 910-15.

[36] Contrary to the lower court's suggestion, this procedure is not in any respect "in derogation of" the tariff filing provisions of the Act. (Pet. App. 24a). Although new tariffs may be filed on the carrier's own initiative, the tariff filing provisions "presuppose that a tariff tendered for filing relates to communications subject to the act which a carrier may legally handle." *Press Wireless, Inc.*, 25 F.C.C. 1466, 1472 (1958), *aff'd per curiam sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959).

thorize. See *Flying Tiger Line, Inc.* v. *CAB*, 204 F.2d 404 (D.C. Cir. 1953).

In addition, the lower court's decision disregards the FCC's understanding of the Act reflected in the entire history of FCC classification of, and grants to, limited service carriers. Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The FCC has repeatedly created classes of common carriers to provide only limited types of service;[37] and it has done so in numerous different ways including codified rule,[38] general rulemaking proceedings,[39] and decisions and grants in individual cases.[40] So far as we are aware, the FCC has never in any of these situations made the "affirmative determination" which the lower court now deems to be necessary, *i.e.*, that it would be contrary

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[37] For example, a class of limited service carriers "to provide fixed public press service" was provided for in the first set of rules adopted by the FCC, on July 11, 1934, reflecting a similar classification in the rules of the superseded Federal Radio Commission. See 47 C.F.R. § 6.3 (1st ed. 1939).

[38] Examples include carriers designed to carry radio and TV signals between broadcast stations, 47 C.F.R. § 21.800, *et seq.* (1976); carriers to provide rural radio services, 47 C.F.R. § 21.600, *et seq.* (1976); carriers to provide land mobile radio telephone service, 47 C.F.R. § 21.500, *et seq.* (1976); and carriers to provide telephone service to off-shore oil drilling rigs, 47 C.F.R. § 21.1000, *et seq.* (1976).

[39] Examples include both the *Specialized Carrier* decision and the FCC's decision creating counterpart private line carriers using domestic satellite facilities. See *Domestic Communications-Satellite Facilities, supra.*

[40] Examples include so-called international record carriers which provide services such as teletype and fascimile to foreign countries, *e.g.*, *Western Union Int'l, Inc.* 9 F.C.C.2d 156 (1967), so-called value-added carriers, *e.g.*, *Graphnet Systems, Inc.*, 61 F.C.C.2d 685 (1976), and carriers to transmit signals to CATV systems, *e.g.*, *Eastern Microwave, Inc.*, 11 F.C.C.2d 146 (1967).

to the public interest for the limited service carrier to provide services which it has never proposed to provide. Nor are such findings made by other licensing agencies when they authorize limited service carriers under parallel statutory provisions.[41]

Until today, the courts and agencies have uniformly understood that a carrier, authorized to provide a particular service or class of service, was limited to that service or class of service unless and until it returned to the agency, filed a new application, and obtained an expansion of its basic authority.[42] The lower court's departure from this long-standing construction involves an important question of regulatory authority appropriate for this Court's review (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 161 (1968)) and represents so "doubtful [a] determination" of an important question that certiorari is doubly warranted. *Williams* v. *Lee*, 358 U.S. 217, 218 (1959).

Finally, it should be emphasized that the lower court's decision in this case is indefensible even if—contrary to fact—the lower court's construction of the Act and the *Specialized Carrier* decision were correct.

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[41] *E.g.*, *Consolidated Carriers Corp.*, 118 M.C.C. 695 (1973) (motor carrier authorized to carry "wearing apparel and materials, supplies, and machinery used in the manufacture thereof" between designated points but no "affirmative determination" excluding other commodities); *Aerovias Colombianas Limitada*, 52 C.A.B. 447 (1969) (authority to carry property and mail between specified points but no "affirmative determination" excluding passengers).

[42] See *Press Wireless, Inc.*, v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) *affirming Press Wireless, Inc.* 25 F.C.C. 1466 (1958) (FCC). *Flying Tiger Line, Inc.* v. *CAB*, 204 F.2d 404 (D.C. Cir. 1953) (CAB); *W. J. Dillner Transfer Co.* v. *United States*, 214 F. Supp. 941 (W.D. Pa. 1963) (ICC).

Even if the *Specialized Carrier* decision was deficient in seeking to limit the specialized carriers to private line service, the court could not lawfully determine on this basis that MCI held authority to provide unlimited service. Instead, consistent with the allocation of authority between courts and agencies, the lower court could only have invalidated MCI's authority as a whole and allowed the FCC to decide afresh what authority, if any, should be afforded to MCI. See *Idaho Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952).[45]

III. The Lower Court's Decision Will Seriously Impair the Regulatory Plan and Provision of Telephone Service at Affordable Rates.

This Court has given weight, in granting certiorari, to the practical effect of the lower court decision.[46] In this case, the adverse consequences of that decision are severe and ramifying. It undermines the FCC's entire regime of grants to limited service carriers, seriously disrupts administrative and judicial proceedings, and threatens the provision of affordable long distance and local telephone service.

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[45] In that case, this Court held that a lower court, invalidating a condition in a license, usurped the administrative function when it sought to affirm the license on an unconditioned basis. Instead, the Court held that the lower court could only affirm or vacate the license as conditioned and, if the condition were struck down, then the agency was entitled to decide anew whether to grant the license in unconditioned form. The basic principle is well established. See, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

[46] *E.g.*, *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947); *Permian Basin Area Rate Cases*, 390 U.S. 747, 755 (1968); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947).

First. The lower court's reading of the Act demolishes the FCC's regulatory structure under which many types of limited service carriers have been authorized to supplement the basic switched public message services offered by the telephone companies. Over the last forty years, the Commission has created numerous classes of limited service carriers.[45] Thousands of Section 214 certificates and Section 309 radio licenses have been granted to implement service in these categories. Lacking the type of "affirmative determinations" called for by the lower court, the careful allocation of functions among carriers now appears to be totally frustrated.[46]

Quite apart from impairing numerous carrier classifications and thousands of individual authorizations already granted, the lower court's decision will cause havoc in future licensing proceedings. Henceforth, every time a certifying agency like the FCC proposes to make a limited service grant, it will have to make and support "affirmative determinations" that it would be contrary to the public interest for the limited service carrier to provide services which it has never sought

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[45] These include CATV relay carriers, television transmission carriers, carriers providing multipoint distribution service, offshore radio carriers, specialized carriers, domsat carriers, international record carriers, value-added carriers, carriers to provide rural radio service, carriers providing mobile telephone service, and carriers to provide news transmission service.

[46] This appears to be equally true for other licensing agencies. For example, the numerous ICC motor carriers certified to haul only specific commodities (*e.g., Michigan & Nebraska Transit Co., Inc.*, 119 M.C.C. 846 (1972); *Consolidated Carriers Corp., supra*) are now presumptively free to carry any products they choose; rarely, if ever, will there have been an "affirmative determination" in the certifying decision that it would disserve the public interest for the carrier to carry items for which it never sought authority.

to provide. This means that every proceeding for a limited service grant, for which no opposition might otherwise exist, will be transformed into an open-ended inquiry into whether a new unlimited service carrier should be authorized for the particular route. The multiplication of issues, the unnecessary litigation, and the attendant delay are manifest.

These consequences—both for past classifications and for future grants—will occur whatever the FCC may do about specialized carriers in any subsequent proceeding under the lower court's decision. The lower court's interpretation of the statute is obviously not limited to Execunet; any FCC decision to authorize a limited service carrier or class of carriers is now subject to the same requirement. Thus, whatever limitations the FCC might ultimately impose on specialized carriers in subsequent proceedings, all other past carrier classifications remain invalid and all other future grant proceedings will be seriously warped and prolonged.

Second. The lower court's decision will immediately cause administrative and judicial disruption on a grand scale, regardless of anything the FCC may ultimately do about restricting specialized carriers in a future proceeding. The FCC has made numerous grants to authorize specialized carrier service on the premise that the carriers were restricted to private line service; and two courts have been induced to affirm major FCC rulemaking proceedings concerning specialized carriers on that assumption. See p. 8, above. If the lower court's decision is allowed to overturn that assumption, then all of these past grants and judicial affirmances have been based on a fundamental mis-

understanding and on incorrect representations, and all of them are subject to being reopened and voided.[47]

The premise that specialized carriers were validly limited to providing private line service has also been relied upon in other types of cases. It has been utilized, for example, to create a parallel class of domestic satellite carriers to provide private line service (see p. 8, above); and it has been a basic assumption in a major FCC proceeding requiring existing carriers to change their practices regarding the resale and shared use of their services.[48] These are merely examples of structural changes and decisions that will have to be reexamined and untangled if the lower court's decision becomes final.

In sum, a great part of what the FCC has done for almost a decade in the field of common carrier regulation has been based on the proposition nullified by the lower court in this case. Decisions in appellate proceedings concerning these regulatory steps have occurred or are occurring in a number of different circuits.[49] To

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[47] It is well settled that the courts can recall their mandates and vacate prior decisions to prevent fraud or injustice and to protect the integrity of judicial processes. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); *Perkins* v. *Standard Oil Company*, 487 F.2d 672 (9th Cir. 1973); *Gradsky* v. *United States*, 376 F.2d 993 (5th Cir. 1967).

[48] See *Resale and Shared Use of Common Services*, 60 F.C.C.2d 261 (1976), *recon. denied*, 62 F.C.C.2d 588 (1977), *appeal pending sub. nom. AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.*

[49] Past and pending cases which involve the premise include *United States* v. *FCC*, D.C. Cir., Nos. 77-1249, *et al.* (grant for joint venture of IBM and others); *Bell Telephone Co. of Pennsylvania* v. *FCC*, *supra* (3rd Cir.); *AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.* (resale and sharing); *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976) (grant to ITT subsidiary); *Washington Utils. & Transp.*

alter this premise on the basis of a single lower court decision is, *mutatis mutandis,* as if the District of Columbia Circuit were permitted to void the Commerce Clause, without regard to years of congressional legislation and of judicial decisions depending directly upon its validity. Such an upheaval ought not to be permitted until this Court has reviewed the decision.

Third. The lower court's decision will have a severe adverse impact on affordable telephone service in the United States. If the lower court's decision stands, the telephone companies will be threatened with a massive diversion of MTS traffic from the switched network.[50] This diversion can occur at an extraordinary rate—literally in a matter of months—because the specialized carriers have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place. Past experience confirms the severity and speed of this threat.[51]

Comm'n v. *FCC, supra* (9th Cir.); *MCI* v. *FCC* and *Southern Pacific Communications Corp.* v. *FCC*, D.C. Cir., Nos. 76-2071, *et al.* ("Sprint" and "SPLS" services).

[50] This does not result from any inherent advantage of specialized carriers, which use the same microwave technology long utilized by the existing carriers. The rates charged by existing carriers on major routes are based on nationwide averaged costs to reflect the need to assure affordable service to customers in low density and rural areas; such rates are also designed to make a contribution toward affordable local telephone rates. See p. 4, n.7, above. Specialized carriers assume no responsibility for nationwide service and make no such contribution so it is easy for them to underprice the telephone companies on major routes.

[51] In the period 1975-76, MCI expanded its Execunet revenues over 70 times, based on its own figures. Roberts affidavit, July 1975, para. 7, filed in the court below; McGowan letter, Aug. 1976, filed in the court below. In the same period, it expanded the number of customers from a handful to "approximately 10,000." McGowan aff., Sept. 1976, para. 8, filed in the court below.

The sudden massive diversion of traffic from the existing MTS network would have very serious effects on the public. The consequence would include a massive loss of MTS revenues and the need for corresponding increases in telephone rates,[52] a reduction of traffic needed to justify the use of high capacity transmission systems presently used to reduce unit costs and long distance rates throughout the system, a loss in the "separations" revenue now used to hold down rates for local exchange services,[53] and the destruction of nationwide rate averaging used to provide affordable long distance rates in low density and rural areas. Ultimately, the victim of these consequences will be the ordinary telephone user, and Congress' policy of universal telephone service at affordable rates will be jeopardized. Section 1 of the Act, 47 U.S.C. § 151.

It is no answer to say that the FCC may conduct further proceedings and reimpose on specialized carriers the limitations which everyone has heretofore assumed to exist. Under the lower court's decision, specialized carriers have every incentive to prolong any such proceeding; whatever the Commission decided would be followed by stay applications to the

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[52] AT&T estimated that $80 million annually in MTS revenues is jeopardized by Execunet circuits in place in July 1976 in only 15 MCI cities. Muench aff., Aug. 1976, para. 12, filed in the court below. If Execunet-type service were allowed to expand without limitation and were extended by MCI and other such carriers to the over 150 cities currently served by specialized and domsat carriers, the traffic diversion and revenue loss could quickly become enormous.

[53] This separations revenue is extremely important in maintaining affordable local telephone service. Approximately 32 percent of all MTS revenue goes to support facilities used primarily for local exchange service.

District of Columbia Circuit and judicial review. See Pet. App. 30a-31a. Years could pass before the FCC's restriction was made effective, even assuming the inquiry itself was not hopelessly prejudiced in the delay.[54]

The Communications Act requires that the impact of new competition would be appraised before, and not after, it is authorized and implemented. See *FCC* v. *RCA Communications, Inc., supra.* Yet if the lower court's decision stands, the entire field of long distance telephone service—where regulation has provided the United States with "the finest telephone system in the world" (President's Task Force on Communications Policy, *Final Report,* ch. 6, p. 5 (1968))—will be opened to full scale competition without any prior determination of the public interest impact of such competition. The lower court's decision directly frustrates both the Act and this Court's *RCA* decision.

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[54] Quite apart from the multimillion dollar losses inflicted in the meantime, this very delay could serve to expand and entrench existing Execunet-type services to the point where effective ultimate FCC relief would probably be impossible. As the FCC explained in relation to CATV, "Once entrenched it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation . . . ." *Second Report and Order on CATV,* 2 F.C.C.2d 725, 782 (1966), *aff'd sub nom. Black Hills Video Corp.* v. *FCC,* 399 F.2d 65 (8th Cir. 1968).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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